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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 482

HERBERT FREDERICK KORHOLZ, ROCK WOOL INSULATING COMPANY, also known as ROCK WOOL INSULATION CORPORATION, a corporation,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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October, 1959

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	5
Statement of the Case	5
Reasons for Granting the Writ	13
Conclusion	22
Appendix A (Opinion)	1a
Appendix B (Judgment)	11a
Appendix C (Order amending opinion)	11a
Appendix D (Order denying rehearing)	12a

CITATIONS

CASES:

Terry v. United States, 131 F. (2d) 40	17
United States v. Dietrich, 126 F. Rep. 671	17
United States v. Fox, 95 U. S. 670	17
United States v. Ryan, 350 U. S. 299	19

MISCELLANEOUS:

Labor-Management Relations Act of 1947, Sec. (a), (b) and (c)(2)—	
29 U.S.C. Sec. 186(a) and (b)	2

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

HERBERT FREDERICK KORHOLZ and the ROCK WOOL INSULATING COMPANY, also known as the ROCK WOOL INSULATION CORPORATION, a corporaton, pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on September 18, 1959.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, (Appendix A, *infra*, pp. 1a-11a) and the amendment thereto (Appendix C, *infra*, p. 13a) are not yet officially reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was first entered August 20, 1959, (Appendix B, *infra*, p. 11a) and became final September 18, 1959, when the opinion was amended and a petition for rehearing was denied (Appendix D, *infra*, p. 12a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of Sec. 302(a), (b) and (c)(2) of the Labor-Management Relations Act, 1947, 29 U. S. C. Sec. 186(a) and (b), are:

> 302(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.
>
> 302(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.
>
> 302(c) The provisions of this section shall not be applicable * * * (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, set-

lement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress;

* * *

QUESTIONS PRESENTED

In order to enable a long-time personal friend, who was president of a labor union local, to obtain a bank loan, petitioner Korholz, who was president of petitioner Rock Wool Insulating Company, (hereafter referred to as Rock Wool), personally guaranteed payment of the loan to the bank. At the time of this guaranty, no employee of Rock Wool was a member of any labor union, and nobody was a representative of any of Rock Wool's employees. The union president thereafter made only one payment on account of the principal amount of the loan, although he continued to pay the outstanding interest from time to time, and Korholz was called upon by the bank to make good on his outstanding obligation to the bank. Korholz discharged his obligation to the bank by a series of payments over a period of approximately two years, using for that purpose available funds from Rock Wool's bank account. The books of Rock Wool at the time treated these payments by Rock Wool as advances to Korholz. About fifteen months after the first such use of Rock Wool's account and over two years after the date of Korholz's guaranty, and only about seven and one-half months before the guarantee was met in full, the union became the bargaining agent for Rock Wool's employees. Prior to that time there was no bargaining of any kind, although there is some evidence that a few employees had been in and out of the union.

1. The first question is whether the use of funds in Rock Wool's bank account, in the circumstances above set forth, constituted a violation of section 302(a) of

the Labor-Management Relations Act, 1947, 29 U. S. C. 186(a). Involved in this question are the following subsidiary questions:

(a) Whether the president of the union was, *ex officio*, a representative of Rock Wool's employees within the meaning of the said section 302(a).

(b) Whether the use of funds in Rock Wool's bank account to enable Korholz to discharge his preexisting and valid personal guaranty to the bank constituted a wilfull and unlawful payment of money to the union president, as charged in the indictment, within the meaning of said section 302(a).

(c) Whether the said section 302(a) purports to make unlawful the above-stated use of Rock Wool's bank account on Korholz's behalf merely because Korholz's obligation to the bank, which was a perfectly valid and innocent obligation when made, matured at times when some of Rock Wool's employees had become union members.

2. The second question is whether the conviction of Korholz for wilfully aiding and abetting Rock Wool in violating the said section 302(a) may be sustained consistently with the due process clause of the Fifth Amendment of the United States Constitution where the payments to the bank were made on his behalf in order to discharge his valid, personal and innocent obligation of guaranty which existed before any employee of Rock Wool affiliated with any union, but which matured at a time after some of Rock Wool's employees became union members.

3. The third question is whether the discharge of Korholz's guaranty obligation, in the circumstances of

this case, is, in any event, exempt from the provisions of said section 302(a) by virtue of the provisions of section 302(c)(2) of the Labor-Management Relations Act, 1947.[1]

STATEMENT OF THE CASE

Rock Wool Insulating Company was indicted, tried, convicted and sentenced to pay a fine in the United States District Court for the District of Colorado for violating Sec. 302(a) of the Labor-Management Relations Act, 1947, 29 U. S. C. 186, which prohibits any employer in commerce from paying or agreeing to pay any money to any representative of any of his employees. Herbert Frederick Korholz, president of Rock Wool, was indicted, tried, convicted and sentenced to imprisonment for four months and to pay a fine of $500 for aiding and abetting the company. The judgment of the District Court was affirmed on appeal, and a petition for rehearing was denied after the Court of Appeals amended its original opinion. (Appendix A, B, C and D, *infra*, pp. 1a-12a). The facts upon which the prosecution is based may be stated as follows:

Korholz, a resident of Pueblo, Colorado, is the president of the Rock Wool Insulating Company, which manufactures insulating materials and ships its products in commerce. Its main office and plant is also in Pueblo. Until September 21, 1955, when the company entered into a contract (Gov. Ex. 24)[2] as of August 31,

[1] In the event this petition is granted, petitioners reserve the right to argue the additional questions set out, *infra*, pp. 20 to 21.

[2] References herein to the printed record used in the court below are designated R, as R.—; to the exhibits in the separate exhibit folder as Def. or Gov. Ex.

1955, with Chauffeurs, Warehousemen and Helpers Local Union No. 146, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the company conducted a non-union operation. The labor contract, pursuant to an NLRB election, provided that "due to the complicated details of wages and working conditions for over-the road drivers, they shall be covered in a separate agreement."[3]

Sometime during the year 1952 Korholz and Fred William Bierig, the president of the union, local 146, in Pueblo, discovered that they both had come originally from the town of Duesseldorf, Germany, where, as boys, many years before, they had been schoolmates (see affidavit of Fred W. Bierig, attached to his amended motion for a new trial, R. 21). They exchanged memories of families and places and began again an association on a personal basis. It eventually developed that Bierig was in financial difficulties through his efforts to purchase a home for himself and his family (R. 27). He told his troubles to Korholz, who was sympathetic. Arrangements were made for Bierig to borrow $2,000 from the Arkansas Valley Bank, the payment of the loan by Bierig to be guaranteed to the bank by Korholz (R. 83). On August 6, 1953, Bierig received the loan from the bank and signed a promissory note, due six months later, for $2,060, the amount of the loan plus interest (Gov. Ex. 45, Def. Ex. D). Korholz then signed what is known as a continuing guarantee (Def. Ex. E, R. 129, 130) which obligated Korholz personally to pay to the bank any and all sums of money loaned or advanced at any

[3] No such agreement was introduced in evidence, but we are informed that a separate agreement relating to the drivers was executed on April 24, 1956, to cover a term to August 1, 1957.

time to Bierig, and to pay all notes and obligations and any renewals thereof made by Bierig, the borrower.

It is extremely important to emphasize the fact that, at the time Bierig made the loan from the bank, and Korholz guaranteed payment, not a single employee of Rock Wool belonged to the Union, Local 146, or any other union. Neither the union nor Bierig, its president, had been authorized to represent any employee of the company. As has been stated, the union as such did not become the bargaining agent of the employees of the company until August 21, 1955 (R. 52), more than two years after Bierig had made the original loan from the bank and the repayment by Bierig had been guaranteed by Korholz; and it does not appear that Bierig was ever authorized individually to represent any of the employees. It should also be stated at this point that all of the subsequent transactions between the bank and Bierig and Korholz grew out of and were integral parts of the arrangements made on August 6, 1953.

Although he was the president of Local 146, Bierig was not the real executive of the union. He took his orders from Paul M. Graf, Jr., secretary-treasurer and business manager of the local (R. 56) who was the negotiator and the chief spokesman for the union (see affidavit by Bierig, R. 24).

When Bierig's note became due, February 2, 1954, he paid the bank $560 on account of his obligation, being $500 on principal and $60 interest, (Def. Ex. A and B), and signed a new note dated February 2, 1954 for $1515 as evidence of the balance due on his original indebtedness to the bank, plus interest for sixty days (Gov. Ex. 45, Def. Ex. D-1). This note became due April 3, 1954, and by that time Bierig was in financial straits and unable to make a payment on

principal. On April 21, 1954, he did, however, pay the accumulated interest of $19.50 (Gov. Ex. 47A) and signed a renewal of his note, to become due June 21, 1954.

Korholz had control of two accounts at the Arkansas Valley Bank, one known as the MPM Investment Company account, MPM being a Korholz family investment company (R. 149), and the Rock Wool account, of which company he was and is president. After it became evident that Bierig could no longer make payments on his principal debt, the bank called on Korholz to make good on his guarantee (R. 130). Under instructions given by Korholz, in response to these demands, the principal of Bierig's loan was reduced from time to time, as renewal notes were signed by Bierig, the amount of reductions being first charged against the MPM account, and when that account lacked funds, then the MPM account was balanced by transferring the charges to Rock Wool's bank account (R. 116). The first reduction through such charges was made in June, 1954. During the period fixed by the indictment, Rock Wool carried all these charges on its books as advances to or charges against Korholz or MPM. Bierig's obligation to the bank was fluctuated upward only once, December 23, 1954, when it rose from $713.50 to $1,522.50, and then went down until it was completely liquidated April 17, 1956 (Gov. Ex. 45). All during the period of his loan, with its successive renewals, Bierig paid the interest charges by his personal checks, the last for $9 being dated in January, 1956 (Gov. Ex. 45 and 47A, *et seq.*). The exhibits show that Bierig personally paid all of the interest charges on his loan except the final interest charge of $5. Gov. Ex. 45 shows that the amount of the loan made by the bank to Bierig on August 6,

1953, was never increased thereafter above the original loan, and only once did it reach the point to which it had been reduced by Bierig through his first payment of $500 on account. And when Korholz was required to meet the obligation of his guarantee, Bierig understood that he would pay Korholz back when he was financially able to do so (See Bierig affidavit, R. 29). Korholz used Rock Wool's bank account to meet the payments made to the bank on his personal guarantee.[1] The bank charged the amounts by which the Bierig notes were reduced first to MPM and then to Rock Wool, and these charges, as stated, during 1954 were carried on the books of the company as charges against or advances to Korholz, and during 1955 and thereafter to MPM. (Testimony of Charles I. Thompson, accountant with Price Waterhouse and Company; (R. 142, 148, 149)). This was the situation throughout the period laid in the indictment—June 15, 1954 to April 17, 1956 (R. 9). Unfortunately, the record is not clear as to what changes or adjustments were made on Rock Wool's books after January, 1957, as a result of the studies of operations in prior years for the company by Price Waterhouse. There are indications that the company charges against Korholz and MPM were treated or to be treated as an expense for labor relations, but Mr. Thompson testified that it would not be proper in the year 1957 to charge these items to the current year's expense. "It would not be an ex-

[1] So many of the Government's exhibits were introduced without adequate explanation of their contents that it is impossible at this stage to say whether they show the actual financial relationship between Korholz and Rock Wool; in other words, whether charges for Korholz were made against Rock Wool because, in the overall picture, Rock Wool owed large amounts of money to Korholz.

pense." (R. 148) However, the period covered by the indictment ends April 17, 1956 (R. 9).

It should be noted that whatever arrangements Korholz made with Rock Wool and with the bank to meet his guarantee on the Bierig notes, there is no testimony whatever to indicate that Bierig ever knew that Rock Wool was involved in the matter in any way. Bierig's financial transactions were with Korholz personally, and Korholz individually was his guarantor.

The record in this case indicates that the Government procured the indictment against the Company and against Bierig under sec. 302(a) and (b) and against Korholz as an aider and abettor (R. 8), on the theory that a so-called "Recognition Agreement" between the company and the union existed at the time that Korholz became a guarantor on Bierig's promissory note. Despite the fact that the Government, in its opening statement to the jury promised to prove the "recognition agreement" (R. 39) the Government failed to prove any such agreement. Frequently discussions about the alleged "recognition agreement" were held in the presence of the jury, which was undoubtedly misled about it. A substantial part of the record is devoted to the efforts by the Government to impress the court and the jury with the importance of the "recognition agreement" which never was admitted in evidence.

Nevertheless the Government, in its brief in the Court of Appeals, began its statement of facts by saying that "During the period from July 6, 1953 to August 31, 1955, there was a recognition agreement between the appellant Rock Wool Insulating Company and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 146 (R. 58) hereinafter called the Union."

This, together with the confusion about it in the trial court, misled even the Court of Appeals in its original opinion, into saying that "From July 6, 1953 to August 31, 1955, there was a 'recognition agreement' in effect between the company and Local No. 146." The effect of all this was to put the union as such and Bierig, its president, into the situation as labor representatives from a date prior to the Korholz guarantee, although, as stated, the union did not become the bargaining agent until September 21, 1955, more than two years after the guarantee was made. When this error of fact was called to the attention of the Court of Appeals it eliminated from its opinion the sentence reading "From July 6, 1953 to August 31, 1955, there was a 'recognition agreement' in effect between the company and Local No. 146." (Appendix C, *infra*, p. 11a)

In addition to its reliance upon the alleged "recognition agreement," the existence of which was never proved, the Government sought to prove a violation of Sec. 302 of the Labor Management Relations Act, 1947 by attempting to show that sometime *after* the date of the guarantee by Korholz there were company employees who had joined the union, Local 146. The only employees involved were the drivers; and the Government offered no testimony as to the workers in the plant or any other class of employee. Luther E. White applied for membership in the Union on December 12, 1953 (R. 152). He testified that at that time the company employed only about four or five drivers (R. 155). White also testified that for a period of 8 or 9 months (he believes it was in 1955) he had a withdrawal card from the union because he held a supervisory job (R. 151). White's payroll records are shown in Gov. Ex. 21. His union application is among the exhibits numbered Gov. Ex. 41. But he is an employee

who was in and out of the union after the date of Koelholz guarantee. There are two applications for union membership by Price Green among the Government's exhibits (No. 38), one dated July 18, 1955, and another November 16, 1954, but Green appears to have been in and out of the union during 1955, his second application card indicating that he was reinstated October 12, 1955. Lawrence Brinlee's application (Gov. Ex. 40) is accompanied by a signed statement (undated) indicating he had withdrawn from Local Union 146 and had not rejoined. However his ledger record card with the union (Gov. Ex. 33) indicates that in February, 1955 he was no longer employed by Rock Wool, and that in 1955 he was suspended by the union. There are several application cards of Floyd M. Day for union membership (Gov. Ex. 42), one dated July 29, 1954 and another dated July 18, 1955, and indicating that Day was reinstated October 10, 1955. Day's ledger record with the union shows (Gov. Ex. 35) that he was suspended from the union July 1, 1955. There is an unidentified card attached which indicates Day may have been suspended again October 1, 1956. Ronald B. Haddock's application card (Gov. Ex. 39) is dated April 4, 1954, and his union ledger record (Gov. Ex. 36) shows that Day was suspended from the union Dec. 31, 1954. Of the five drivers, White, Green, Brinlee, Day and Haddock,—and that seems to have been about all during any part of the period laid in the indictment, who were in and out of membership in the union, three—Brinlee (R. 164), Haddock (R. 157) and White (R. 150)—testified in the case. Apparently they understood rather clearly that the union would not be in a position to bargain collectively for them until it had, by a vote of the majority of the employees, been certified as the bargaining agent.

There is no indication whatever that any of them expected the union to represent them individually, and there is no testimony in the record that either the union or Bierig made any effort to represent any of the drivers in negotiations with Rock Wool until Local 146 had been certified by the National Labor Relations Board in August, 1955. In fact, Paul M. Graf, Jr., the secretary and treasurer and business manager of Local 146, testified "nobody can represent the employees for working conditions or anything else unless you have a majority of the people organized and representing the majority of them in any plant" (R. 192). At various times during 1954 Rock Wool sent checks to Local 146, representing deductions for union dues from several of the drivers, but the record does not indicate how or when this practice started or the extent of its application (Gov. Ex. 4A to 4E). There is no evidence that Korholz personally knew when any of Rock Wool's employees joined or left or rejoined the union.

The case was tried on the Government's testimony, the trial court denying motions for directed verdict (R. 212). The mandate from the Court of Appeals has been stayed to await action on this petition (Appendix D, *infra*, p. 12a).

REASONS FOR GRANTING THE WRIT

1. The prosecution involved herein is prohibited by both constitutional and statutory provisions. This case is of extreme and continuing importance because it involves an attempt by the Government to give a retrospective, even *ex post facto*, interpretation and effect to labor legislation in a criminal prosecution. It is of extreme and continuing importance because the result ignores the plain provisions of Sec. 302(c)(2) of the

Labor Management Relations Act, 1947 which exempt such transactions as those upon which the prosecution in this case is based. It is of extreme and continuing importance because it involves jail sentences and fines on persons who are not guilty of any crime. It is of extreme and continuing importance because the only rational explanation of the convictions by the jury on the facts in the record is that the union mentioned is a Teamster union, some of the officers of which (but not this one) have been involved in nation-wide charges of bribery, corruption and gangsterism. That this situation, highly prejudicial to the petitioners, existed and was in the forefront of the minds of the judge and the jury too, is highlighted by the trial judge's statement to counsel, after the convictions: "The Congress felt and, of course, we all know the present committees that are engaged in investigating in this same field that it is a matter that should not be countenanced and should not be condoned." (R. 220) And so the trial Court confused this case, involving perfectly normal relationships between two boyhood friends, with the then current newspaper accounts of bribery and corruption and other crimes involving different constituent parts of the same union.

The facts in this case simply do not support a charge of unlawful payment by an employer to a representative of his employees, and receipt of money from the employer by such a representative. Sec. 302 of the Labor Management Relations Act, 1947 was enacted to prevent collusion and worse between employers and labor representatives. The legislative purpose has been stated often in many cases by this Court. It has nothing to do with such a situation as is present here. Two boyhood friends in Germany meet thousands of miles away and a generation afterward. One is the presi-

dent of a company, the other the president of a union. The union official had personal financial troubles, and the more prosperous one agreed to help. No labor issue or problem was involved. There is not a shred of evidence, or a suggestion of any kind that the president of the company needed or wanted any labor favor from the union or the union official or vice versa. Not a single one of the company employees belonged to the union, and the president of the company had no objections to union membership (R. 159).

Bierig, the union president, borrowed $2,000 from a bank. This was not a payment to him in the sense that that word is used in Sec. 302(a) and (b) of the Labor Management Relations Act, 1947. Bierig did not receive the money as his own. He was obligated to pay it back. And, at the time (August 6, 1953) Bierig made the loan and Korholz made the guarantee, Bierig did not represent any employees, nor did his union, and Korholz neither then nor thereafter was regarded by the Government as the employer. But whether he was or not, nobody committed any crime in August, 1953, when Bierig made his loan and Korholz guaranteed it. Nor was any crime committed when, six months later, in February, 1954, Bierig paid out of his own pocket the sum of $500 to reduce the principal of his loan, and $60 in interest; nor, two months later, in April, 1954, when Bierig paid the interest but was unable to pay anything on principal and signed a renewal note, to become due in June, 1954. Now how did this transaction, innocent and legal, according to the Government's evidence, when entered into, and for a long time thereafter, become criminal? And who were the criminals?

Bear in mind that the Government did not offer any evidence, and there is none in the record anywhere, at

lacking the *bona fides* of the loan transaction and of the guarantee, or attacking the good faith of Bierig in promising to repay, or ascribing any ulterior or bad or corrupt motives either to Bierig or Korholz or the company. To the contrary, the painful payments of interest to the bank by Bierig, in financial straits as he was, negate any such idea. And Bierig paid all of the interest over the years, except the sum of $5 at the end.

In June, 1954, when Bierig became in default, payments of $300 to the bank were made by Korholz, who used Rock Wool's bank account for the purpose. The Government contends that when Korholz used Rock Wool's account to meet his guarantee, that act made criminals out of Korholz and Bierig, although all that happened was that Bierig's obligation to pay the bank was gradually transferred from time to time into an obligation to pay Korholz, and made a criminal out of Rock Wool, although there is no evidence, first, as to the nature of the financial relationship between Rock Wool and Korholz, and no evidence that Bierig ever knew that Rock Wool's bank account was being used by Korholz to meet the guarantee. There does not seem to be any reason why Korholz could not have used the company's bank account, or any other bank account over which he had control, to settle his obligation to the bank, without making criminals of the debtors and the company. This action cannot be construed to be a violation of any provision of the Labor Management Relations Act, 1947.

Initially, the Government had developed a theory that criminality was involved on the basis of the alleged existence of a prior "recognition agreement" between the company and the union; and when that alleged agreement was excluded from the case, the

Government tried to fill the gap by relying on it anyhow, as the record discloses. Failing in the "recognition" argument, the Government now contends that the subsequent joining of the union by two or three employees of Rock Wool somehow made the loan and the guarantee illegal *ab initio*, especially as still later on the union was formally recognized as the bargaining agent for Rock Wool. This necessarily was the basis of the decision below, especially after the Court of Appeals, by amending its original opinion, eliminated the "recognition agreement" from the case.

But this contention is surely unsound. This Court long ago held in *United States* v. *Fox*, 95 U. S. 670 that "The criminal intent essential to the commission of a public offense must exist when the act complained of is done; it cannot be imputed to a party from a subsequent independent transaction." This Court held that legislation designed to punish acts under the circumstances stated in the *Fox* case would be unconstitutional.

In *United States* v. *Dietrich*, 126 Fed. 671 (C.C., D. Neb. 1904), it was held that an indictment charging a Senator with accepting a bribe for obtaining an appointment to office for somebody else could not be sustained where it appeared that the defendant, although elected to Congress, had not become a member of Congress until after the alleged event had occurred. And in *Terry* v. *United States*, 131 F. (2d) 40, (C.A. 8, 1942), the Circuit Court of Appeals had before it a conviction on an indictment charging the making of false statements in a matter within the jurisdiction of a federal agency. The false statements were made to a private corporation which used them to obtain insurance for itself from the Federal Housing Administra-

tion. The Court said (p. 44), "We are of the opinion that on the charge and proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams loan transaction on which the indictment rests at the time of the commission of the acts charged against the defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission may not be converted into a crime at a subsequent time by the independent action of other persons." And the court cited the *Fox* and *Dietrich* cases, *supra*.

It is submitted that under the authorities cited and facts in this case, no offense was committed at the time Korholz guaranteed Bierig's loan, and that the subsequent acts of any of Rock Wool's employees in joining or leaving or rejoining the union could not clothe the loan transaction or the Korholz guarantee with criminality.

2. There are other considerations which show the inapplicability of Sec. 302(a) or (b) of the Labor Management Relations Act, 1947. In the first place, Bierig, who obtained the loan, was not a representative of Rock Wool's employees. It has been pointed out that at the time the loan was made, neither Bierig nor the union represented any employees. Again, even after the union became the bargaining agent, in August, 1955, more than two years after the debt was contracted, assuming that Korholz, who was not an employer, could be prohibited from meeting his obliga-

tion to the bank, it does not appear that Bierig represented the employees. The mere fact that Bierig was the president of Local 146 did not automatically make him a representative of the employees within the meaning of the Act. This is the question expressly left open for later consideration by this Court in *United States v. Ryan*, 350 U. S. 299, where the Court said, "We do not decide whether any official of a union is ex officio a representative of employees under Sec. 302." In determining that Ryan, the respondent in that case, was a representative within the meaning of Sec. 302, this Court pointed out that Ryan represented the employees both as union president and as principal negotiator. In the case at bar the principal negotiator, together with a committee of which Bierig was not even a member, was Paul M. Graf, Jr., secretary-treasurer and business manager (R. 56, 72, 171). Bierig, in his affidavit, said that Graf instructed him (Bierig) to stay away from the Rock Wool plant, and Bierig had nothing to do with the negotiations (R. 24).

The question as to the status of a union president in this connection is still a question of continuing importance and is not resolved by the recently enacted Labor-Management Reporting and Disclosure Act of 1959, approved September 14, 1959, which adds, in the new Section 302(a)(4), additional requirements of proof to bring a union officer, as such, within its prohibitions.

3. The Court below failed to apply the provisions of Section 302(*c*)(2) of the Labor Management Relations Act, 1947, which provide that the provisions of Sec. 302 shall not apply with respect to the payment or delivery of any money "in compromise, adjustment,

settlement or release of any claim, * * * in the absence of fraud or duress."

The bank's claim against Korholz is certainly such a transaction as is entirely outside of the prohibitions of Sec. 302. The Government never charged or offered to prove that Korholz's payments in settlement of the bank's claim against him were created through fraud or duress. The Government merely contends that if the transaction was not criminal when entered into, it became criminal later on; that Korholz, who was solely liable to meet Bierig's defaulted loan, had, because he used the company's bank account to discharge his liability, substituted the company as the principal criminal, and that he, Korholz, was not an employer of labor but was an aider and abettor. It should be noted that the provisions in the Act of 1947 expressly exempting the application of 302 from transactions involving the settlement of claims, is repeated verbatim in the Labor-Management Reporting and Disclosure Act of 1959.*

4. Other defenses. In the courts below the petitioners contended among other things that the count in the indictment upon which they were convicted is duplicitous, in that it alleges a number of alleged offenses, thus depriving the petitioners of the opportunity to make a defense against a particular alleged violation. It is submitted that the indictment offends Rule 8(a)

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* The completely absurd and artificial basis of the convictions in this case can readily be seen when it is realized that if Korholz had actually become the employer himself and Bierig was clearly the representative of Korholz's employees, no offense would have been committed because of the exonerating provisions of Sec. 302(c)(2). Similarly, if Rock Wool had made the original guaranty, its subsequent discharge of that obligation would have been perfectly legal under the same Sec. 302(c)(2).

of the Federal Rules of Criminal Procedure, which provides that:

> "Two or more offenses may be charged in the same indictment or information *in a separate count for each offense*, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (Emphasis added.)

One of the other defenses upon which petitioners relied below is that there is a fatal variance between the allegations in the indictment and the proof. The indictment charges the payment of money by Rock Wool to a representative of its employees. Rock Wool never paid any money to Bierig, assuming that he was a representative of employees. The Government, for reasons suitable to it, did not charge the payment of a thing of value, but limited the accusation to the payment of money to Bierig by Rock Wool, which was not proved.

Another defense is the entire lack in the record of any evidence from which it could be found, even by inference, that there was any wilful violation of Sec. 302 of the Labor Management Relations Act, 1947, as required by Sec. 302(a). The refusal of the trial court to grant a proper instruction on that issue was protested in the district court and in the Court of Appeals.

These issues, raised below, are not abandoned on this petition, but the petitioners reserve the privilege of urging them in greater detail upon this Court in the event the petition is granted and the writ is issued.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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